Filed 6/2/09 P. v. Ramos CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNY SAMORA RAMOS,

Defendant and Appellant.

F054581

(Super. Ct. No. 30126)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. John D. Kirihara, Judge.

Gregory M. Chappel, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Kenny Samora Ramos was convicted in count one of possession of a concealable firearm by a person previously convicted of a violent felony (Pen. Code, § 12021.1 [all further code references are to the Penal Code]) and in count two of possession of ammunition by a prohibited person (§ 12316, subd. (b)(1)). In addition, it was found he committed two prior serious felonies within the meaning of the Three Strikes law and served a prior prison term. He was sentenced to prison for a term of 25 years to life. He appeals, claiming the trial court erred when it denied his motion to suppress a statement he made when he was detained and arguing his sentence is cruel and unusual punishment. Except to order that the matter must be remanded to the trial court for a new sentencing hearing to either impose or correctly strike his prior prison term enhancement on each count, we affirm.

FACTS

On May 27, 2006, Guadalupe Pena telephoned Susana Maldonado in the early morning hours and said there was a problem. Maldonado went to Pena's apartment and knocked on the door. She did not receive a response. Shortly thereafter, a man known to Maldonado as Jose came of the apartment and ran to his car. Jose said that while he was in the apartment a man came in with a gun and pointed it at him. Jose was afraid. Maldonado called police.

Merced police officers Keith Reig and Eduardo Chavez were dispatched regarding a man with a gun. Reig was flagged down by Maldonado, and she said there was a problem in the apartment regarding a man with a gun. Maldonado pointed out the apartment to Reig. Reig knocked on the door and Pena opened the door. Chavez and Reig saw defendant come out of the bathroom and then run quickly back into the bathroom.

The officers entered the apartment and detained defendant. Reig saw a pipe commonly used to smoke methamphetamine on top of the trash can in the bathroom.

Underneath the pipe there was a red bandana and a loaded gun. Defendant was searched. On his belt was a pouch containing ammunition that could be used in the gun that was found in the bathroom. Pena's two small children were in the apartment on the bed.

Reig questioned Pena and defendant about the ownership of the pipe. When they did not respond, he commented to Pena that if he could not determine the ownership of the pipe he may have to call child protective services (CPS). After Reig made this statement to Pena, defendant said that all of the items in the trash were his.

During a court hearing, defendant testified that he owned the pipe, but did not know anything about the gun in the trash; he had just come into possession of the ammunition when Pena gave it to him. Defendant said he took the ammunition to protect Pena's children.

DISCUSSION

I. Admission of Defendant's Statement

Defendant made a motion to exclude the statement he made to Officer Reig that all of the items in the trash belonged to him. He claimed the statement was inadmissible as a violation of *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) because, although he had been detained and handcuffed, he had not waived his *Miranda* rights and his statement was in response to questioning by Reig.

Reig testified defendant was handcuffed and detained and was present in the same room with Pena. Reig asked both of them to whom the methamphetamine pipe belonged. Neither one responded to the question. Reig then turned his attention to Pena. Reig assumed that the two children in the apartment were Pena's children based on the statements given to police before the officers entered the apartment. Speaking to and looking directly at Pena, Reig told Pena that Reig needed to find out to whom the pipe belonged or else CPS might have to be called. As Reig was speaking to Pena,

defendant, who was five or six feet away, stated that all of the items in the trash can belonged to him.

Defendant argued to the trial court that his statement to Reig should be excluded because he was in custody and questions were posed to him without a *Miranda* warning. He claimed his statement was made as a result of the prompting by Reig. The court denied defendant's motion and found the statement was admissible. The statement was thereafter admitted at trial.

Defendant asserts his statement was not spontaneous but was the result of an unlawful custodial interrogation. It is argued that the statement by Reig regarding CPS was clearly made for the purpose of eliciting an incriminating response and the likely result of the statement was for defendant to respond. In addition, defendant claims his statement was not voluntary. In particular, defendant contends his will was thwarted by the threat of potentially serious consequences to Pena and her children.

"Defendants who are in custody must be given *Miranda* warnings before police officers may interrogate them." (*People v. Huggins* (2006) 38 Cal.4th 175, 198.) "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301, fns. omitted.)

"Interrogation thus refers to questioning initiated by the police or its functional equivalent, not voluntary conversation. [Citations.] '"Volunteered statements of any kind are not barred by the Fifth Amendment...."' [Citation.] The 'functional equivalent'

to express questioning involves police-initiated deceptive techniques designed to persuade or coerce a criminal defendant into making inculpatory statements. [Citation.] The determination of whether an action is reasonably likely to elicit an incriminating response focuses primarily on the perceptions of the suspect, rather than the intent of the police." (*People v. Thornton* (2007) 41 Cal.4th 391, 432.)

Reig's statement to Pena regarding CPS was not a direct interrogation of her and clearly was not a direct interrogation of defendant. Neither was the statement the functional equivalent of an interrogation of defendant. The comment regarding CPS was made directly to Pena based on Reig's belief that Pena was the parent of the children in the apartment. While it was argued by defense counsel in the trial court that defendant responded to the statement because he had a close relationship to the children and the statement elicited defendant's sympathy, no such relationship was established at the time of the motion to suppress and the evidence known to Reig showed otherwise. Thus, the action of Reig was not reasonably likely to elicit an incriminating response from defendant. Based on the same reasoning, we reject defendant's argument that his statement was not voluntary because it was made as a result of coercion.

II. Cruel and/or Unusual Punishment

It was found true by the court that defendant suffered two prior serious felony convictions within the meaning of the Three Strikes law. The trial court denied the motion to strike one or both of his strikes and sentenced him in count one for the term of 25 years to life. The same sentence was ordered to run concurrently for count two.

Defendant argues that but for the fact he was a previously convicted felon his possession of a weapon would not have been a crime at all, and therefore the imposition of the punishment of 25 years to life is cruel and unusual punishment. He contends that the penalty imposed is disproportionate when considering the nature of the offense and the nature of the offender. In particular, defendant emphasizes that his prior felony

conviction was utilized to make the current crime a felony, and then utilized again to increase his sentence to the term of 25 years to life.

Although defendant challenged his sentence below and requested the trial court to strike one or both of his prior serious felony convictions, defendant did not challenge his sentence in the trial court on the basis of cruel and unusual punishment. Having failed to raise the issue below, it is waived on appeal. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

Even if defendant had properly raised the issue, the argument would not prevail. "Successful challenges based on proportionality are extremely rare. [Citation.] The defendant must show that the sentence is '"out of all proportion to the offense"' and that it offends 'fundamental notions of human dignity.'" (*People v. Kelley, supra,* 52 Cal.App.4th at p. 583.)

Defendant characterizes his conviction as the mere possession of a firearm that would not otherwise be criminal if he did not have any prior felony convictions. "[T]he California Legislature views the possession of a handgun by an ex-felon to be a serious offense. The intent underlying section 12021, subdivision (a) was to limit the use of instruments commonly associated with criminal activity and to minimize the danger to public safety arising from the free access to firearms that can be used for crimes of violence. [Citation.] The law properly presumes the danger is greater when the person possessing the firearm has previously been convicted of a felony." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 824.)

Also, defendant is not being punished only for his current offense but also for his recidivism. It is well established that recidivism justifies the imposition of longer sentences for subsequent offenses. (*People v. Cooper, supra,* 43 Cal.App.4th at p. 825.) Defendant has a long criminal history beginning at the age of 17 in 1980 when he was committed to the California Youth Authority after it was found true he committed an

assault with a deadly weapon. Defendant's adult convictions include two separate robbery convictions (strikes), two separate convictions for being a prisoner in possession of a weapon, a felony conviction for assault with a deadly weapon, a felony conviction for being under the influence of a controlled substance, a conviction for evading a police officer, two separate convictions for obstructing and resisting a public officer, and a misdemeanor conviction for driving under the influence of alcohol or drugs. In addition, defendant violated his parole on several occasions. During much of this time span from 1980 to the current offense, defendant was incarcerated or was on probation or parole. Defendant is clearly the type of recidivist who falls within the spirit of the Three Strikes scheme. (*People v. Pearson* (2008) 165 Cal.App.4th 740, 749-750.) Defendant's sentence is not cruel and/or unusual punishment.

III. Prior Prison Term Enhancement

It was alleged as to counts one and two that defendant served two prior prison terms. The trial court found it true that defendant served one prior prison term within the meaning of section 667.5, subdivision (b). At sentencing the prior prison term enhancement was not mentioned. Regarding the sentence in count one, the clerk's transcript states that "subsequent to hearing, not reported, court orders 1 year on enhancement 2 [prior prison term]--stayed." The same disposition is stated for this same enhancement regarding count two. The abstract of judgment lists the prior prison term enhancement as stayed.

It was error for the trial court to stay the section 667.5, subdivision (b) prior prison term enhancement. The trial court may either impose the enhancement or strike it pursuant to section 1385. (*People v. McCray* (2006) 144 Cal.App.4th 258, 267.)

DISPOSITION

The matter is remanded to the trial court to hold a new sentencing hearing and either impose the enhancement or strike it in compliance with section 1385. If the court

strikes the prior prison term enhancement, it must set forth its reasons in an order entered upon the minutes. (*People v. Bonnetta* (2009) 46 Cal.4th 143.)

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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LEVY, J.

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CORNELL, J.